

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7187

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----x
RUTH FRIEDMAN, RAYMOND FRANKLIN, :
SIDNEY MOHR, WILLIAM C. LINGARD, AND :
CHIAM PEIMER, individually and on behalf of :
all other persons similarly situated, :

Plaintiffs-Appellants,

-against- :

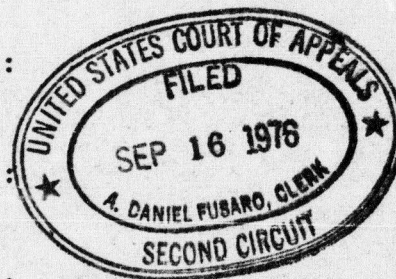
STEPHEN BERGER, individually and as :
Commissioner of the New York State Depart- :
ment of Social Services, THE NEW YORK STATE :
DEPARTMENT OF SOCIAL SERVICES, JAMES :
DUMPSON, individually and as Commissioner of :
the New York City Department of Social Services, :
and THE NEW YORK CITY DEPARTMENT OF :
SOCIAL SERVICES, :

Defendants-Appellees. :
-----x

REPLY BRIEF FOR
PLAINTIFFS-APPELLANTS

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RUTH FRIEDMAN, RAYMOND FRANKLIN,
SIDNEY MOHR, WILLIAM C. LINGARD, AND
CHIAM PEIMER, individually and on behalf of
all other person similarly situated,

Plaintiffs- Appellants,

-against-

STEPHEN BERGER, individually as
Commissioner of the New York State
Department of Social Services, THE NEW YORK
STATE DEPARTMENT OF SOCIAL SERVICES,
JAMES DUMPSON, individually and as
Commissioner of the New York City Department
of Social Services, and THE NEW YORK CITY
DEPARTMENT OF SOCIAL SERVICES,

Defendants- Appellees.

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REPLY BRIEF FOR
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PRELIMINARY STATEMENT

This reply brief is submitted in reply to two points raised in the brief for defendants-appellees ("defendants"). With respect to all other issues plaintiffs-appellants ("plaintiffs") rely on their main brief.

ARGUMENT

POINT I

H.E.W.'S POSITION ON THIS CASE SHOULD NOT BE ADOPTED BY THIS COURT BECAUSE THIS POSITION CONFLICTS WITH THE SPECIFIC LANGUAGE OF THE SOCIAL SECURITY ACT

Although the position of H.E.W. in this case is entitled to some deference from this Court, that deference does not extend to acceptance of H.E.W.'s position when it is inconsistent with the language of the Social Security Act. This principle is made clear even in the single case cited by defendants on this point, Udall v. Tallman, 380 U.S. 1 (1965). Brief for Defendants, p. 6, 8. In Udall, the Supreme Court held that the interpretation of certain executive orders made by the Secretary of the Interior should be adopted by the courts "[i]f...the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction..." 380 U.S. at 802.

Plaintiffs' argument in this case is exactly that the specific language of the Social Security Act will not bear the construction H.E.W. would place on it. As discussed on pages 16-17 and 21-24 of plaintiffs' main brief, H.E.W. has wilfully ignored specific language of at least two sections of the Act which directly contradict its position in this case.

Under these circumstances, Udall v. Tallman, supra, requires this Court to reject H.E.W.'s position.

POINT II

PLAINTIFFS HAVE STANDING
TO ASK THE RELIEF THEY
REQUEST

Defendants contend on page 8 of their brief that plaintiffs lack standing to raise the issue of the proper level to which SSI recipients are required to "spend down" since plaintiffs are not themselves SSI recipients. This contention misinterprets plaintiffs' position. Plaintiffs ask relief only with respect to the "spend down" level applicable to themselves, non-SSI recipients. Under the comparability requirement of 42 U.S.C. §1396a(a)(17)*, however, the plaintiffs' rights are determined at least in part by adopting the standard applicable to SSI recipients defined elsewhere in the Social Security Act. Since there is a dispute about the extent of the rights of SSI recipients between the parties in this case, that issue is a necessary part of determining plaintiffs' own rights. But this situation arises not because plaintiffs are asserting the rights of others, but because the Act applies the standard applicable to SSI recipients to plaintiffs as well.

*See Plaintiffs' Main Brief, pp. 9-13.

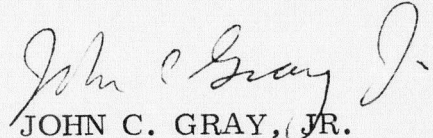
Since plaintiffs assert only their own rights to retain a larger amount of their income, there can be no question of their standing to ask relief they seek.*

*Plaintiffs' argument does imply that defendants may be violating the rights of SSI recipients as well as their own, but any possible claim SSI recipients may have is not part of this action.

CONCLUSION

For all of the foregoing reasons, the order and judgment of the district court should be reversed and remanded to the district court with instructions to enter judgment for plaintiffs and their class.

Respectfully submitted,


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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF KINGS)

John C. Gray, Jr.

being duly sworn, deposes

and says:

That deponent is not a party to the action, is over 18 years of age and resides at *159 Bergen St., Brooklyn, New York*

That on the *16th* day of *September*, 1976, deponent served the within *reply brief for plaintiffs - appellants* on each addressee listed below, being the address designated by said *person* for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, addressed to:

- 1) Louis J. Cefkowitz -
Attorney General
2 World Trade Center
New York, N. Y.*
- 2) W. Bernard Richland
Corporation Counsel
Municipal Building
New York, N. Y.*

John C. Gray, Jr.

Sworn to before me this

16th day of *September*, 1976

Theresa Raduazzo
NOTARY PUBLIC

Theresa Raduazzo
Notary Public, State of New York
No. 24-3194670
Qualified in Kings County
Commission Expires March 30, 1977